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No. 92-940

In The

Supreme Court of the United States

October Term, 1992

ALM CORPORATION,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In its opposition brief, the respondent EPA misrepresented the petitioner ALM's position by stating, "Petitioner does not dispute the court of appeals' conclusion that it was reasonable for the Administrator to interpret Section 15 as proscribing violations of 19 C.F.R. 12.121 and to interpret Section 16 as authorizing civil penalties for such violations." (Opposition brief at 8). ALM has consistently contended that the EPA's interpretations of the involved penal statute and Customs regulations were wrong as a matter of law on several grounds. (Petition at

9). The Third Circuit admitted that various interpretations were possible, but upheld the EPA's interpretations based squarely on what might be characterized as a *Chevron* deference analysis. (Petition at 12a). The petition focuses on this aspect of the court's decision which is the principal reason why the matter warrants the attention of this Court. Nevertheless, ALM maintains that the EPA's interpretations of the penal provisions of an otherwise regulatory statute were contrary to law.

ALM did not "violate" TSCA or the Customs regulations in any manner since the omission of a TSCA certification from an entry documents package filed with Customs at the time of importation does not violate the regulations. Rather, Section 13 of TSCA and the implementing Customs regulations provide a comprehensive enforcement response in such circumstance which includes detention and/or seizure of the imported merchandise, redelivery to Customs' custody on demand, and, upon a failure to comply, the assessment of liquidated damages under the importer's surety performance bond. Importantly, the regulations allow an importer the opportunity to cure the omission, or to redeliver the goods or to export them under Customs' supervision, rights that were not afforded to ALM. Accordingly, none of the events contemplated by the regulatory scheme or which occurred in this case could constitute the violation of a law. More to the point, Customs' neglect to administer its own regulations did not empower the EPA to rectify the matter by applying a civil penalty statutory provision so as to create a violation where none existed. In this sense, EPA's interpretation was wrong.

Assuming *arguendo* that the omission of the TSCA certification from a Customs entry could be deemed to be a breach of the Customs regulations, it would not *ipso facto* constitute a failure to submit "reports, notices, or other information" within the meaning of section 15 of TSCA. This provision should be construed within its statutory context as ALM urged before the Third Circuit. The EPA applied the broadest possible interpretation without the support of extrinsic or intrinsic aids to construction. There was no justification for departing from the well settled rule that penal statutes are strictly construed against the sovereign.

The above described interpretative errors were compounded by the Third Circuit's deference to the agency that made them. The court should not have deferred, but instead should have construed the penal provisions strictly with reference to the "reports, notices, or other information" described elsewhere in TSCA, mindful of the complete compliance mechanism established by Section 13 in connection with imports, and in accordance with the rule that penal statutes are strictly construed.

CONCLUSION

For the foregoing reasons, ALM asks the Court to entertain argument that the Third Circuit erred by deferring to a regulatory agency's interpretation of a penal statute in an enforcement proceeding.

Respectfully submitted,

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